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PP v. WAN HASRUL NIZAM WAN HIZAMUDDIN

HIGH COURT MALAYA, SHAH ALAM
ZULKIFLI BAKAR J
[CRIMINAL APPEAL NO: 42H-45-06-2016]
10 JANUARY 2017

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CRIMINAL PROCEDURE: *Sentence – Adequacy – Possession of dangerous weapon without lawful excuse – Releasing accused on bond of good behaviour under s. 294(1) of Criminal Procedure Code – Whether sentence passed commensurate with crime committed – Public interest – Mitigating factors – Whether trial judge rightly considered rehabilitative potential of accused – Corrosive and Explosive Substances and Offensive Weapons Act 1958, s. 6(1)*

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This was an appeal filed by the Public Prosecutor ('appellant') against the inadequacy of the sentence/order imposed by the Sessions Court Judge ('trial judge'). At the Sessions Court, the accused ('respondent') was charged under s. 6(1) of the Corrosive and Explosive Substances and Offensive Weapons Act 1958 ('the Act'). A body search on the respondent led to the discovery of a wood hilted sword at his waist. The respondent pleaded guilty to the said charge. The trial judge found the respondent guilty and made the order/sentence that the accused be released on bond of good behaviour under s. 294(1) of the Criminal Procedure Code ('CPC') for a period of five years with one surety and providing security of RM3,000. The appellant contended that the sentence passed did not commensurate with the crime that had been committed by the respondent and hence this appeal.

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Held (dismissing appeal):

(1) 'Interests of the public' is best served not merely by imposing custodial sentence as spelled out in the legislations but by encouragement to induce the offender to turn from criminal ways to honest living. It is endowed upon this court with significant discretion to decide before passing sentence to strike out a balance between public interests and individual interests in order to do justice in the circumstances of the case. Even though the courts' power to punish is derived from legislation, the judges will ultimately still be the best and qualified persons in undertaking the task of sentencing the accused person after assessing and considering the relevant judicial established principles of sentencing. (paras 11, 12 & 14)

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(2) This court took into account the plea of guilty and the respondent being a first offender as relevant mitigating factors, and acknowledged that the trial judge had correctly considered these factors in her grounds of judgment. Further, the respondent had claimed that the sword he brought along was for self protection as he had trauma of being robbed previously. There was merit in this contention although its purpose could not be considered lawful. This court took judicial notice the

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notorious fact that there was a rise in crimes of robbery and murder in the area of Klang. Thus the respondent had provided a sufficient basis for warranting him to be given a second chance with the conviction recorded whilst he was being released under stern warnings not to commit the same offence. The respondent was not exonerated of the offence; the custodial or any other sentence spelled out in the said section is being suspended and awaiting him if he ever commits any offence within the period of five years. (paras 16-18)

(3) The order made by the trial judge in releasing the respondent with bond of good behaviour under s. 294 of the CPC was sufficient and appropriate in the circumstances of this case as it also gave a lesson to the respondent and to educate him not to bring or have in possession a dangerous weapon in public without authorisation or lawful purpose. The respondent was not a hardened criminal since he had no previous criminal antecedents and the purpose (though unlawful) was due to the fear portrayed by the respondent as a victim who assimilated a previous painful experience of trauma of being robbed. The trial judge had rightly considered the rehabilitative potential of the respondent. (paras 19-20)

Case(s) referred to:
Chandra Sekaran Ramiyah & Anor v. PP [2000] 3 CLJ 293 CA ***(refd)***
Jayanthan v. PP [1973] 1 LNS 56 FC ***(refd)***
Lee Chow Meng v. PP [1976] 1 MLJ 287 ***(refd)***
Lim Yoon Fah v. PP [1970] 1 LNS 66 HC ***(refd)***
Mohammad Faizal Sabtu v. PP [2012] 4 SLR 947 ***(refd)***
Mohd Abdullah Ang Swee Kang v. PP [1987] 2 CLJ 405; [1987] CLJ (Rep) 209 SC ***(refd)***
Ng Chwee Puan v. Reg [1953] 1 LNS 60 HC ***(refd)***
Nor Afizal Azizan v. PP [2012] 6 CLJ 370 CA ***(refd)***
PP v. Hassan Ali Abdul Razak [2016] 9 CLJ 584 HC ***(refd)***
PP v. Lee Ah Sam (F) [1949] 1 LNS 62 HC ***(refd)***
PP v. Md Rashid Harun [2000] 3 CLJ 832 HC ***(refd)***
PP v. Wahab [1964] 1 LNS 150 HC ***(refd)***
Wong Keng Liang v. PP [2013] 1 CLJ 96 CA ***(refd)***
Yong Pak Yong v. PP [1959] 1 LNS 102 HC ***(refd)***

Legislation referred to:
Corrosive and Explosive Substances and Offensive Weapons Act 1958, s. 6(1)
Criminal Procedure Code, s. 294(1)

For the appellant - Rozana Husin; DPP
For the respondent - KA Ramu; M/s KA Ramu Vasanthi & Assocs

Reported by Suhainah Wahiduddin

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JUDGMENT

Zulkifli Bakar J:

Background

[1] This is an appeal filed by the Public Prosecutor ("appellant") against the inadequacy of the sentence/order imposed by the learned Sessions Court Judge ("trial judge"). The accused ("respondent") was released on bond of good behaviour under s. 294(1) of the Criminal Procedure Code ("CPC") for a period of five years commencing from 2 June 2016 with one surety and providing security of RM3,000.

[2] I heard the appeal and dismissed it. I shall now give my reasons as below.

[3] At the Sessions Court, the respondent was charged under s. 6(1) of Corrosive and Explosive Substances and Offensive Weapons Act 1958 ("the Act") as follows:

> Charge:
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> Bahawa kamu pada 18/5/2016 jam lebih kurang 1000 hrs, di Jalan Jed 4, Bandar Parklands, di dalam daerah Klang, di dalam negeri Selangor, didapati dalam milik kamu senjata berbahaya iaitu sebilah pedang berhulu kayu panjang berukuran lebih kurang 45 cm, tanpa maksud yang sah. Oleh yang demikian kamu telah melakukan kesalahan di bawah seksyen 6(1) Akta Bahan-bahan Hakisan dan Letupan dan Senjata Berbahaya 1958 (Akta 357) dan boleh dihukum di bawah seksyen yang sama.

[4] I reproduced the salient facts that had been captured by the learned trial judge in her grounds of judgment as described in the following:

> 7. On 18 May 2015, at about 22.00 hours near Bandar Parklands Klang, the complainant and his team during Operasi Cegah Jenayah had seen a motorcycle bearing registration plate no. WB659C ridden by the accused in suspicious manner. The complainant introduced himself to the accused but the accused sped off trying to escape to a nearby shoplots.
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> 8. With the assistance of the URB Klang Selatan, the accused eventually got arrested.
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> 9. A body search on the accused led to the discovery of a wood-hilted sword at his waist. (pg 9, Appeal Record, Vol. 1)

[5] On the last 2 June 2016, the respondent, represented by his counsel, had pleaded guilty to the charge as above. This court noted that the learned trial judge had considered the respondent's mitigation before the said order was handed down. The respondent pleaded with the learned trial judge to not imposing the imprisonment sentence.

[6] The learned trial judge then found the respondent guilty and made the order against the respondent as abovementioned. The learned Deputy Public Prosecutor contended that the sentence passed did not commensurate with the crime that had been committed by the respondent and hence this appeal.

At The Appeal In This Court

Discretion Of The Court

[7] According to the appellant, it is for the public interests which is paramount that requires the appellant to press for the mandatory imprisonment sentence of minimum five years to be given by this court since public interests supersede the individual interest. The appellant contended that there was failure of the learned trial judge in not taking into account the public interests when imposing the said sentence or order (*Chandra Sekaran Ramiyah & Anor v. PP* [2000] 3 CLJ 293; *PP v. Md Rashid Harun* [2000] 3 CLJ 832).

[8] The appellant emphasised to this court that the amendment made to s. 6(1) of the Act which was in force from 2 July 2014 ought to be complied strictly by this court that is, upon conviction, the court sentences the respondent with the imprisonment of not less than five years and not more than ten years, and to whipping.

[9] I reiterate as I did in the case of *PP v. Hassan Ali Abdul Razak* [2016] 9 CLJ 584 wherein this court had dealt with the same subject matter that the words "be liable" used in the said s. 6(1) of the Act had in fact allowed this court with a discretion to pass a sentence as it thinks fit since the imprisonment term provided therein is not mandatory to be imposed upon conviction under the said section (*Ng Chwee Puan v. Reg* [1953] 1 LNS 60; [1953] MLJ 86; *PP v. Wahab* [1964] 1 LNS 150; [1964] 1 MLJ 265; *PP v. Lee Ah Sam* [1949] 1 LNS 62; [1949] 1 MLJ 236; *Jayanathan v. PP* [1973] 1 LNS 56; [1973] 2 MLJ 68).

[10] This court found no reason to interfere with the discretion exercised by the learned trial judge sparingly in this regard since the Deputy Public Prosecutor failed to prove to this court that the discretion in question was exercised unjustly and in a way injurious to the public interests.

[11] In my considered judgment, "interests of the public" is best served not merely by imposing custodial sentence as spelled out in the legislations but by encouragement to induce the offender to turn from criminal ways to honest living (*Lim Yoon Fah v. PP* [1970] 1 LNS 66; [1971] 1 MLJ 37).

[12] It is endowed upon this court with significant discretion to decide before passing sentence to strike a balance between public interests and individual interests in order to do justice in the circumstances of the case. Of course the court must not overlook the sentence with deterrent effect to the public especially to the offender of his ills apart from society's abhorrence against the crime.

[13] I echoed the judgment of Chan Sek Keong CJ (as he then was) in the case of *Mohammad Faizal Sabtu v. PP* [2012] 4 SLR 947 where His Lordship stated:

> [45] Since the power to prescribe punishments for offences is part of the legislative power and not the judicial power (as Commonwealth and US case law shows), it must follow that no written law of general application prescribing any kind of punishment for an offence, *whether such punishment be mandatory or discretionary and whether it be fixed or within a prescribed range, can trespass onto the judicial power. On the contrary, it is the duty of the courts to inflict the legislatively-prescribed punishments on offenders, exercising such discretion as may have been given to them by the Legislature to select the punishments which they think appropriate*. As Yong Pung How CJ said in *PP v Tan Fook Sum* [1999] 1 SLR(R) 1022 ("*Tan Fook Sum*") at [14]:
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> > It is axiomatic that the court must pass sentence according to law: ss. 180(n)(ii) and 192(2) of the [Criminal Procedure Code (Cap 68, 1985 Rev Ed)]. A 'sentence according to law' means that the sentence must not only be within the ambit of the punishable section, but it must also be assessed and passed in accordance with established judicial principles: *PP v. Jafa bin Daud* [1981] 1 MLJ 315 at 316. Leaving aside for the moment the ambit of the relevant 'punishable section' in the present case, the application of the 'established judicial principles' really requires the court, where the Legislature's prescriptions as to punishment are open-ended, to balance the diverse and often competing policy considerations. (emphasis added)

[14] Hence, I am of the view that even the courts' power to punish is derived from legislation, the judges will ultimately still be the best and qualified persons in undertaking the task of sentencing the accused person after assessing and considering the relevant judicial established principles of sentencing. For instance, in the case of *Mohd Abdullah Ang Swee Kang v. PP* [1987] 2 CLJ 405; [1987] CLJ (Rep) 209, the Supreme Court held that:

> In assessing the length of custodial sentence, the *Court must look at the overall picture in perspective by considering firstly, the gravity of the type of offence committed; secondly, the facts in the commission of the offence; thirdly, the presence or absence of mitigating factors, and fourthly, the sentences that have been imposed in the past for similar offences to determine the trend of sentencing policy, if any*. The fact that a sentence of imprisonment is imposed as a deterrence does not justify the sentencer in passing a sentence of greater length than the facts of the offence warrant. The gravity of the type of offence involved must be considered in the light of the particular facts of the offence. As stated by James LJ in *R v. Ladd & Tristam* [1975] Crim LR 50; Encyclopedia of Thomas Current Sentencing Practice p. 1058:
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> > *We have to look at the overall picture of what is the right sentence for the total involvement, the total degree of criminality involved, and we have to keep the sentences in perspective with the sentences that have been passed on other occasions for offences involving criminal activity of this kind, though*

of course varying in their gravity. Clearly a deterrent element has to be involved, but because the offences are very serious, it does not necessarily follow that on the particular facts very long sentences are justified. (emphasis added)

Mitigating Factors

[15] The respondent in his mitigation stated that he is 34 years old, working as a shop assistant with monthly income of around RM1,000 and he is married having one child. The respondent submitted that he is a first offender.

[16] In the criminal justice system, the court should give the appropriate discount to the sentence supposed to be imposed at the end of a full trial after having heard the mitigation. In the present case, this court takes into account the plea of guilty and the respondent being a first offender as relevant mitigating factors, and acknowledged that the learned trial judge had correctly considered these factors in her grounds of judgment. All these had been undertaken by the Court of Appeal in the case of *Wong Keng Liang v. PP* [2013] 1 CLJ 96; [2013] 4 MLJ 263 and I quote:

[12] *It is trite law that accused's guilty plea is a mitigating factor: see Sau Soo Kim v. Public Prosecutor [1975] 2 MLJ 134 per Lee Hun Hoe J (B); and Melvani v. Public Prosecutor [1971] 1 MLJ 137; [1971] 1 LNS 78 per Wee Chong Jin CJ (Singapore) (as then was) who also considered 'first offender' as another mitigating factor, as has been done by Mohamed Azmi J (later FCJ) in Public Prosecutor v. Jafa bin Daud [1981] 1 MLJ 315.* As alluded to above, learned deputy public prosecutor has taken the position that 'This is the accused's first case in Malaysia'.

[13] *Generally, the accused's guilty plea also allows the court to exercise the discretion to give a discount or reduction of one-quarter or one-third of the sentence which would have been imposed after a full trial: Mohamed Abdullah Ang Swee Kang v. Public Prosecutor [1988] 1 MLJ 167, as followed in Public Prosecutor v. Ravindran & Ors [1993] 1 MLJ 45.*

[14] The sentencing discretion belongs to the court of first instance as the sentencing court: *Zaidon Shariff v. Public Prosecutor* [1996] MLJU 159; [1996] 4 CLJ 441 at p 445. (emphasis added)

[17] Essentially, this court noted the argument advanced by the Deputy Public Prosecutor in relation to the motorcycle ridden by the respondent was reported to be stolen. Notwithstanding this, it could not be accepted as a relevant factor to be considered in the exercise of imposing sentence for this case since the respondent was not charged in respect of the said motorcycle and there is no findings of guilt or conviction against the respondent for any offence related to the said motorcycle.

[18] Other than that, the respondent claimed that the sword he brought along was for self-protection as he had trauma being robbed previously. This court found merit in this contention although it cannot be considered as

lawful purpose. In my considered judgment, the respondent's act is probable, that it is not safe for him to earn a living as shop assistant especially during night time in the area of Klang.

(a) This court takes judicial notice the notorious fact that there has been a rising crimes of robbery and murder in Klang, which constitutes a general knowledge based on media reports and number of cases registered in Klang and Shah Alam's courts (*Lee Chow Meng v. PP* [1976] 1 MLJ 287; *Yong Pak Yong v. PP* [1959] 1 LNS 102; [1959] 1 MLJ 176);

(b) In that context, this court recognises that the respondent has provided a sufficient basis for warranting him to be given a second chance with the conviction recorded whilst he is being released under stern warnings not to commit the same offence in future; and

(c) The respondent is in fact found guilty and convicted. He is not being exonerated of the offence. The custodial or any other sentence spelled out in the said section is being suspended and awaiting him if ever he commits any offence within the period of five years.

Conclusion – Decision At This Appeal

[19] After having heard the submissions from both counsel and Deputy Public Prosecutor and considered the entire relevant evidence recorded in the present case, this court found the order made by the learned trial judge in releasing the respondent with bond of good behaviour under s. 294 of CPC is sufficient and appropriate in the circumstances of this case as it also gives a lesson to the respondent and to educate him to not bring or have in possession of the dangerous weapon in public without authorisation or lawful purpose. A guidance is made by the Court of Appeal in the decision of *Nor Afizal Azizan v. PP* [2012] 6 CLJ 370; [2012] 6 MLJ 171:

> [21] At this juncture, we would like to clarify the misconception on the applicability of s. 294 of the CPC. *We would like to point out that the orders made under s. 294 of the CPC do not exonerate the person of the offence that he had committed. The person is in fact convicted of the offence and the conviction will be recorded and will form part of the person's Criminal record and will remain there for the rest of that person's life. The effect of such an order was clearly spelled out in the case of Jayanthan v. PP [1973] 1 LNS 56, wherein Ong Hock Sim FJ held that*:
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> > *This section vests the Court before which a person is convicted with power to suspend sentence for such period as the Court may direct, and, if the offender behaves himself during such period, he would escape punishment for his offence. If he fails to observe the conditions of his bond, he would be liable to be apprehended and dealt with for his original offence*.
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> [22] Thus, in the instant case, the appellant was in effect given a suspended prison sentence. *He has to behave himself for a period of five years. If he behaves himself during the five years period, he would escape punishment for his offence. But if he fails to observe the conditions of his bond, he will then be arrested*

and dealt with for the original offence of rape. Like the learned SCJ, we are hopeful that the suspended sentence would give the appellant another chance in life and that he will "turn over a new leaf". If the order of the suspended prison sentence has the effect of rehabilitating him, then public interest has indeed been served and best served. (emphasis added)

[20] Pursuant to the above, I am persuaded by two essential mitigating factors raised, that is the respondent was not a hardened criminal since he has no previous criminal antecedents and the purpose (though unlawful) was due to the fear portrayed by the respondent as a victim who assimilates a previous painful experience of trauma of being robbed whilst earning a living. Therefore, in order to achieve the right balance between deterrence and rehabilitation, the learned trial judge had rightly considered the rehabilitative potential of the respondent in the present case of which I shared the same wisdom.

[21] This appeal is hereby dismissed. The order made by the learned trial judge is affirmed.